Calendar No. 678

99TH CONGRESS
2d Session

SENATE

REPORT
99-319

GENERAL FEDERATION OF WOMEN'S CLUBS

JUNE 6, (legislative day, JUNE 2), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1827]

The Committee on the Judiciary, to which was referred the bill (S. 1827) to amend the Act entitled "An Act granting a charter to the General Federation of Women's Clubs," having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

PURPOSE

On August 2, 1984, The General Federation of Women's Clubs (GFWC) was granted, tax exempt status under section 501(c)(3) of the Internal Revenue Code contingent upon amendment to bring the GFWC charter into compliance with IRS standards. The purpose of this amendment to the existing charter is to adapt the language in section one of the current charter to comply with the requirements of the 501(c)(3) tax-exempt status given by the IRS.

The current charter of GFWC describes the purpose of this charitable organization in the following terms: "For educational, industrial, philanthropic, literary, artistic and scientific culture."

This description of the organization is not specific enough to meet the requirements of 501(c)(3) status. Thus, tax-exempt status for this organization depends upon approval of this bill which alters the above description as follows:

> The General Federation of Women's Clubs shall be organized and operated exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954 and shall otherwise comply with any requirements for classification as an

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exempt organization under such section. Said charitable purposes shall be achieved through volunteer efforts on the part of the membership of the General Federation of Women's Clubs, specifically including arts programs, conservation programs, education programs, homelife programs, international affairs, public affairs programs advancing information regarding public affairs, and community improvement programs.

This change in wording more clearly defines the activities of the General Federation of Women's Clubs. This will meet IRS requirements and ensure that GFWC retains its status as a tax-exempt, charitable organization.

With the 501(c)(3) rating, all 11,000 clubs throughout the country would fall under the "Umbrella clause" and would be able to use this postal rating on GFWC business mailings, saving each of these clubs money in postal costs. These clubs, under the 501(c)(3) rating can also send tax-deductible donations to the main headquarters; thus, the members are motivated to donate money and therefore, the GFWC's capacity for service increases.

The main headquarters uses these donations for many projects, including funding for the printing of the magazine called "Club Women's Magazine", printed on a regular basis and sent to all the members of the club. Money donated also goes toward the GFWC Rescurce Center, a library built for public use and operated by the volunteer efforts of the GFWC. With this building still under construction, some of the money from donations will go toward construction costs, supplies, books and other furnishings. Also, the money would help fund GFWC's volunteer programs in the arts, conservation, education, homelife, international affairs, public affairs and community improvement. Hence with its 501(c)(3) rating secure, the GFWC will save money in postage and is likely to receive more donations toward its many worthy service projects.

History

The act entitled "An Act Granting a Charter to the General Federation of Women's Clubs" was first approved on March 3, 1901. Since then, this charter has undergone many legislative changes. It was amended by act approved April 28, 1904, amended by an act approved April 6, 1922, amended by an act approved June 7, 1934, and amended by an act approved December 15, 1975. These amendments were made necessary to compensate for the changing value of three buildings owned by the GFWC. The 1975 amendment deleted the existing monetary limit on the value of corporate property in the incorporation statute of the General Federation of Women's Clubs so that the property is no longer subject to these monetary limits.

On September 10, 1984, Mr. Hatch introduced S. 2977, to again amend this charter, this time to change the language to conform with the current Internal Revenue Code of 1954 in allowing the GFWC to qualify for a 501(c)(3) tax-exempt status. The bill was referred to the Judiciary Committee, however no further action was taken during the 98th Congress.

On November 5, 1985, Mr. Hatch introduced S. 1827, the same bill, known in the previous Congress as S. 2977. On March 20, 1986, the Committee on the Judiciary considered the bill. Mr. Hatch offered an amendment further clarifying the existing language of the bill. Both the amendment and the bill were approved by unanimous consent.

STATEMENT

The General Federation of Women's Clubs (GFWC), chartered by the United States Congress in 1901, is the largest and oldest nondenominational, nonpartisan, international service organization of volunteer women in the world, representing 500,000 members in the United States.

The object of the GFWC, as stated in its charter, is to bring into communication and to unite the women's clubs and like organizations throughout the world for the purpose of mutual benefit and for the promotion of their common interest in charitable and educational programs. Membership in GFWC consists of women's clubs and organizations whose work and purpose are germane to the objectives of the GFWC. Each application for membership must show that the organization requires no partisan political test for membership, that it is not a secret society, and that it does not tolerate, either by practice or teaching, any violation of State or national laws. In a sentence, the purpose of GFWC is to unite women's clubs in order to enhance community service efforts by volunteers throughout the country and the world.

The General Federation of Women's Clubs is comprised of 11,000 clubs with 500,000 members in the United States and Puerto Rico, with 10 million members worldwide in 46 countries.

The GFWC's motto—"Unity in Diversity"—is apt. The GFWC encourages and supports diverse interests, methods, programs, and projects to meet the needs of communities, states and nations.

GFWC members organize and expedite volunteer programs that strengthen and improve the communities in which they live. These programs and projects fall into six categories at the national, regional and local levels: Home life, public affairs, education, conservation, the arts, and international affairs. Many of these community programs and projects seek funding through corporate sponsorship.

During the years 1984-86, GFWC members donated 45 million hours and more than $100 million to volunteer projects.

GFWC's record of accomplishments and activities is extensive and its influence far-reaching. For example, GFWC established the National Model for Juvenile Court Law in 1899, turned the tide for passage of the Pure Food and Drug Act in 1906, initiated the movement to establish the National Park Service in 1912, and worked for passage of the first child labor laws in 1938. GFWC is responsible for the establishment of 75 percent of the public libraries in this country. Today, clubs report contributions to projects such as the establishment of after-school care programs, drug abuse prevention programs, community conservation and beautification projects, anti-drunk/drugged driving campaigns, victim assistance

programs, the elimination of illiteracy and the promotion of international understanding and aid.

The following are examples of specific projects undertaken by GFWC clubs at the international, state and local levels:

In 1985, GFWC international clubs accomplished the distribution of 200,000 pieces of clothing (donated by Health-Tex) to needy children, who had been identified by the clubwomen, in 13 countries: Amsterdam, Brazil, Canada, Colombia, France, Greece, Honduras, Jamaica, Liberia, the Philippines, St. Croix, Thailand, and Uruguay.

For the past 77 years, the GFWC in Georgia has owned and operated the Tallulah Falls School, a non-discriminatory boarding school for boys and girls grades six to twelve. Called "The Light in the Mountains," the school was founded in 1909 to meet the needs of disadvantaged children living in remote mountain regions who had little or no access to schools.

A youth crisis center was established in only two months by Wyoming clubmembers to provide a refuge for young people who have had to leave their homes.

Project Reddi (report every dangerous driver immediately) was developed by the Ohio State chairman with the Department of Highway Safety.

"Support for the Battered Women" was adopted as State project in Connecticut. Concentrating on one of the 12 shelters throughout the State, each club collected food, clothing, toys, household appliances and furniture for distribution to the shelter in their area. One thousand dollars was given to the Connecticut Task Force on Abused Women. The continued services of clubmembers volunteering their assistance on the hot-line "Extend the Outreach."

Skilled leadership, imperative to the expansion and influence of GFWC, is strengthened in quality through the GFWC-Chevron Leadership Development Institute. Leadership seminars sponsored by Chevron U.S.A., Inc., were conducted in the eight U.S. regions in late 1983. The institute's theme, "Lead Today With a Plan for Tomorrow," is developed through training in motivational technique, conference planning, parliamentary procedure and program development.

These are just a few of the many, many programs the GFWC is involved in throughout the country.

Section Analysis

Section 1. In amending the broad language contained in section 1 of the current existing charter, which reads: "For educational, industrial, philanthropic, literary, artistic and scientific culture" to the language contained in S. 1827, as amended, the GFWC charter is brought into compliance with the requirements of the Internal Revenue Code of 1954. This allows the GFWC to keep their conditional 501(c)(3) tax-exempt status.

Committee Vote

On March 20, 1986, with a quorum present, by voice vote, and without objection, the Committee on the Judiciary approved S.

1827 with an amendment and ordered the bill favorably reported with said amendment.

COST ESTIMATE

In compliance with paragraph 11(a), rule XXVI of the Standing Rules of the Senate, the Committee estimates that enactment of this legislation will involve no direct additional expenditure to the Government. The Committee notes the following letter from the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 24, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1827, a bill to amend the act entitled "An act granting a charter to the General Federation of Women's Clubs," as ordered reported by the Senate Committee on the Judiciary, March 20, 1986. CBO estimates that no costs to the federal government or to state or local governments will result from the enactment of this bill.

This bill amends the statute granting a federal charter to the General Federation of Women's Clubs, in order to affirm that the federation will comply with all requirements for classification as a tax-exempt organization. It specifies that the federation will operate exclusively for charitable and educational purposes, as required by section 501(c)(3) of the Internal Revenue Code of 1954. In the event of its dissolution, all assets of the federation are to be liquidated and distributed by the board of directors to similar tax-exempt organizations.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD GRAMLICH
(For Rudolph G. Penner, director).

REGULATORY IMPACT

In compliance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee has concluded that this legislation does not create any new regulations with which the public must comply.

CHANGES IN EXISTING LAW

In compliance with paragraph 12, rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1827, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new language is printed in italic, existing law in which no change is proposed is shown in roman):

STATUTES AT LARGE

OF THE

UNITED STATES OF AMERICA,

FROM

DECEMBER, 1899, TO MARCH, 1901,

* * * * * * *

VOL. XXXI.

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CHAP. 860.—An Act Granting a charter to the General Federation of Women's Clubs

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That *(a)* Mrs. Rebecca D. Lowe, Atlanta, Georgia; Mrs. Dimies T.S. Denison, New York, New York; Miss Margaret J. Evans, Northfield, Minnesota; Mrs. Emma A. Fox, Detroit, Michigan; Mrs. George W. Kendrick, junior, Philadelphia, Pennsylvania; Mrs. Emma M. Van Vechten, Cedar Rapids, Iowa; Mrs. George H. Noyes, Milwaukee, Wisconsin; Mrs. Edward L. Buchwalter, Springfield, Ohio; Mrs. William J. Christie, Butte, Montana; Mrs. William T. Coad, Rapid City, South Dakota; Mrs. Laura Rockwell Priddy, Wichita, Kansas; Mrs. Frank Sherwin Streeter, Concord, New Hampshire; Mrs. Anna D. West, Somerville, Massachusetts; Mrs. Charles W. Fairbanks, Indiana; Mrs. Lucia E. Blount, Washington, District of Columbia; Mrs. Ralph Trautman, New York; Mrs. John L. McNeil, Colorado; Mrs. Mary S. Lockwood, Washington, District of Columbia; Mrs. May Wright Sewall, Indiana; Mrs. J.C. Croly, New York; Miss Mary V. Temple, Tennessee; Mrs. Phoebe A. Hearst, California; Mrs. Kate Tannett Woods, Massachusetts; Mrs. Julia Plato Harvey, Illinois; Mrs. Jane O. Cooper, Colorado; Mrs. Harriet H. Robinson, Massachusetts; Mrs. Ellen M. Henrotin, Illinois; Mrs. Mary E. Mumford, Pennsylvania; Mrs. C.P. Barnes, Kentucky; Mrs. Philip N. Moore, Missouri; Mrs. Alice Ives Breed, Massachusetts; Mrs. Frank Trumbull, Colorado; Miss Annie Laws, Ohio; Mrs. Sarah S. Platt-Decker, Colorado; Mrs. J.C. Royle, Utah; Josephine Bates, Mary Rogers, Octavia W. Bates, Fanny Purdy Palmer, Julia Ward Howe, Cordelia I. Sterling, Katherine Nobles, Mary D. Steele, and their associates and successors, are hereby created a body corporate and politic, of the District of Columbia, by the name, style, and title of the General Federation of Women's Clubs, and by that name shall have perpetual succession [, for educational, industrial, philanthropic, literary, artistic, and scientific culture, and to bring into communication with one another the various Women's Clubs throughout the

world, with power in said corporation to make and use a common seal, and to alter the same at pleasure].

(b) The General Federation of Women's Clubs shall be organized and operated exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954 and shall otherwise comply with any requirements for classification as an exempt organization under such section. Said charitable purposes shall be achieved through volunteer efforts on the part of the membership of the General Federation of Women's Clubs, specifically including arts programs, conservation programs, education programs, homelife programs, international affairs, public affairs programs, advancing information regarding public affairs, and community improvement programs.

(c) In the event of the dissolution of the General Federation of Women's Clubs, its board of directors shall liquidate and distribute its assets to organizations qualified as exempt organizations under section 501(c)(3) of the Internal Revenue Code of 1954 with purposes similar to those of the General Federation of Women's Clubs.

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Calendar No. 679

99TH CONGRESS
2d Session

SENATE

REPORT
99-320

ASSURING FAIRNESS IN ALLOCATION AND AWARD OF ANTITRUST DAMAGES

JUNE 6 (legislative day, JUNE 2), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1300]

The Committee on the Judiciary, to which was referred the bill (S. 1300) to assure fairness in the allocation and award of antitrust damages, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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I. PURPOSE

In 1914, the Clayton Act authorized private treble-damage actions to be brought by any person "injured in his business or prop-

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erty by reason of anything forbidden in the antitrust laws . . ." (15 U.S.C. §15) Private damage actions have become a potent supplement to the considerable power of the government to enforce the antitrust laws. While the effectiveness and continued need for the private remedies in antitrust law are beyond dispute, the committee has for some time been concerned with the current process by which the allocation of private antitrust damages is determined.

Under the principle of joint and several liability, which was made applicable to antitrust law by the decision in *Chattanooga Foundry and Pipe Works* v. *Atlanta,* 127 F. 23 (6th Cir. 1903), *aff'd,* 203 U.S. 309 (1906), every individual defendant is considered liable for the damages attributable not only to its own particular sales to the plaintiff or plaintiffs, but also for the damages attributable to all of its fellow conspirators. In other words, each defendant faces the possibility of judgement of treble the entire damages caused by all defendants combined. The common law doctrine of joint and several liability was intended to insure that plaintiffs could recover their total damages, but the recent operation of joint and several liability has resulted in inequitable and unfair pressure on defendants in antitrust suits.

The inequity addressed by this bill arises from a system of civil damages that threatens small defendants—who may be guiltless—with liability for three times the damages caused by an entire industry. This unfairness arises from the combined effects of joint and several liability, mandatory treble damages and procedures permitting nationwide class actions in private antitrust suits. When confronted with these remedial devices, a defendant could face potential liability greatly exceeding the company's assets. Plaintiffs are currently free to seek the damages caused by an entire group of conspirators from any one of them, and simply to decline to sue the others. Furthermore, the larger quilty defendants in a conspiracy case frequently settle with the plaintiffs early in the litigation for disproportionately low sums, forcing other, often smaller, companies to pay enormously escalating sums to settle later in the litigation without any regard for culpability.

S. 1300 is designed to rationalize the allocation of damages in antitrust suits, so that antitrust defendants will be more likely to pay their fair share of any damages awarded. In the effort to make enforcement of the antitrust laws more effective—that is, to provide consumers with better products at lower prices by maintaining competitive markets—it is also important to achieve fairness among defendants, especially those who may be at most tangentially related to the alleged wrongdoing and who may, in fact, be wrongly accused. In the view of the committee, laws which are intended to deter and punish those who engage in anticompetitive conduct should not permit plaintiffs to settle cheaply with a few defendants and then to extract larger or proportionately larger payments from other defendants who face potential liabilities well in excess of their shares of the affected market.

In some class-action antitrust cases, defendants can reach sharing arrangements usually based on relative sales, to apportion the joint liability among themselves in a way that avoids disproportionate payments by any one defendant. As this Committee's report on S. 1468 and S. 995, predecessor bills containing claim-reduction pro-

visions, made clear, the committee regards such agreements as consistent with public policy and with effective enforcement of the antitrust laws. Accordingly, this bill will not affect the validity of sharing agreements among co-defendants.

The record makes it very clear, however, that such sharing agreements are not always possible, especially in non-concentrated industries with large numbers of small and medium-sized companies as well as large firms. In antitrust cases in which sharing agreements cannot be worked out, the effect of open-ended liability on those defendants left in the litigation after earlier settlements may be to drive smaller defendants to settle, even if they believe that they are innocent and would prefer to defend themselves. Under current practice, as noted, if one or more defendants settle a case for less than their proportionate share of the total claim, without persuading the plaintiff to agree not to seek treble damages with respect to the settling defendants' sales, those who remain in the litigation face the prospect of enormous liability, since they would remain liable for treble the damages caused by settling defendants as well as by themselves, minus only the amount paid in settlement. This system places great pressure on the remaining defendants to settle at a higher rate rather than take even a small risk of being held liable for each other's damages and the damages of those who settled out early and cheaply.

S. 1300 will remedy the abuse of these "whipsaw tactics" by relieving defendants who do not settle of the liability for injury attributable to defendants who settle and co-conspirators who are not sued. As we discuss below, however, S. 1300 as amended would not change the principle of joint and several liability and would in no way impair the plaintiffs' rights against any defendant or any antitrust violator.

The amended bill would affect neither joint and several liability nor treble damages. It would simply provide for the reduction of plaintiffs' total claim against multiple defendants by three times the damages attributable to any defendants who settle and, in any horizontal agreement cases, by three times the damages attributable to any co-conspirator who was not sued. During the hearings, the Administration expressed concern that the bill as introduced—which would have eliminated joint and several liability in horizontal agreement cases affecting prices—may have reduced the deterrent effect of the private enforcement system on antitrust violators. That concern was based on the observation that if a person faces the prospect of liability for three times the antitrust damages it causes, it is more likely to commit an antitrust violation than if it faces the greater liability for three tiems the damages caused by all of the participants in the antitrust violation. On the other hand, other antitrust scholars, such as Professor Mitchell Polinsky, testified that the bill even as introduced may in fact increase deterrence, by making it less likely that an antitrust violator could escape liability altogether or settle for an amount far below the level of damages it caused. Professor Polinsky's view is consistent with an observation made by Justice Brennan when a member of the New Jersey Supreme Court:

> If each intentional wrongdoer knew that his conduct was exposing him to the risk of certainty of liability of some amount, the desired deterrent effect would be produced more surely than if [apportionment of liability] among wrongdoers is denied. *Judson* v. *Peoples Bank and Trust Co.*, 17 N.J. 67, 88, 110 A. 2d 24, 34 (1954).

It is the intention of the committee in reporting this bill that deterrence will be increased by making it more certain that antitrust violators will bear responsibilities more closely proportional to the damages they cause.

To restructure and revise the apportionment of antitrust damages through claim reduction and mandatory joinder as provided by amended S. 1300 will restore balance, fairness and rationality—as well as reinforce deterrence—to the private antitrust enforcement system. As each participant in an antitrust violation becomes more likely to settle for an amount more closely approximating its fair share of the liability, each defendant (and each would-be violator) will be aware that it cannot escape the responsibility for its own acts and will behave accordingly.

The problem of disporportionate settlement pressure, or "whipsawing," that leads to grossly distorted allocation of responsibility in class-action suits has long been recognized as inequity that needs to be corrected. It is also recognized that in other major areas of law, abuses arising out of joint and several liability are tempered by some combination of claim reduction, contribution or comparative fault. Thus, S. 1300 affords a narrow and sensible remedy to a source of great unfairness in private antitrust law enforcement.

II. Text of S. 1300 as Reported

A BILL To assure fairness in the allocation and award of antitrust damages.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 4H the following new section:

"Sec. 4I. (a)(1) The court shall reduce the claim under section 4, 4A, or 4C of this Act of any claimant releasing any person from liability or potential liability for such claim by the greatest of: (1) any amount stipulated for this purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released from liability or potential liability (or treble such actual damages to the extent such claim is for treble damages) and any interest on such actual damages under section 4, 4A, or 4C of this Act.

"(2) In any action under section 4, 4A, or 4C of this Act based on a contract, combination, or conspiracy among competitors, the court shall conclusively presume that any person whose sales or purchases would otherwise be included in a calculation of damages based on overcharges or underpayments has been released from liability or potential lability if it has not been joined as a defendant and if it is established by the defendant that such person is legally or practically available as a party to the action to recover such damages.

"(b) For purposes of subsection (a):

"(1) Where the claim is based upon a price fixing agreement among competitors and damages are sustained by reason of overcharges or underpayments resulting from such agreement, damages shall be allocated on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments.

"(2) With respect to all other claims, damages shall be allocated n the basis of relative responsibility for the origination or perpetration of the violation for which damages are being awarded and the benefits derived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages by the method used in paragraph (b)(1).

"(c) Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws, and nothing in this section shall affect whether or not an action may be maintained as a class action under rule 23(b) of the Federal Rules of Civil Procedure.

"The provisions of this Act shall apply to all actions commenced under section 4, 4A or 4C of the Clayton Act after the date of enactment of this Act.".

III. Need for Legislation

As we described above, the purpose of S. 1300 is to remedy the inequitable whipsaw settlement effect in private antitrust litigation and to insure equitable allocation of responsibility among joint violators of the antitrust laws. In antitrust cases against multiple defendants, plaintiffs have the freedom a) to choose which parties to sue and b) to settle with some defendants while holding the others jointly liable for the total claim for treble damages, less any actual amount paid in settlements. As defendants settle out, the pressure on remaining defendants increases, and plaintiffs will generally settle with remaining defendants only for amounts disproportionately higher than previous settlements. Such "whipsawing" is undesirable from the standpoint of antitrust policy, since it renders irrelevant the guilt or innocence of the defendants as well as the degree of harm actually caused or benefit derived by any particular party. Liability may literally be apportioned according to the whims of plaintiffs' attorneys rather than according to any concept of culpability. The companies with the greatest market shares, who would usually benefit most from joint antitrust violations, may escape from private class-action litigation for less than their fair share of damages, or even for nothing at all, while companies with smaller market shares or small roles in the wrongdoing face judgments for the bulk of an entire industry's liability.

The committee heard testimony regarding past and current examples of the whipsaw settlement effect. Some of the most illuminating accounts of this whipsaw pressure are those in the committee report on S. 995, a predecessor of S. 1300, which included a provision for claim reduction. Current examples of whipsawing will be described below, but the earlier accounts are valuable because they so graphically explain the injustice of the dilemma addressed by this bill.

Two witnesses related their experiences in the massive *Corrugated Container* class action litigation. Mr. George Kress, Chairman of the Board of Green Bay Packing, Inc., told the committee that at the conclusion of the Justice Department's investigation of the corrugated industry, 14 corporations and numerous individuals were indicted for violations of the antitrust laws; neither Green Bay nor any of its employees were charged. However, Mr. Kress reported, within the year following the government's investigation, Green Bay was named as a co-defendant in more than 25 class action civil suits brought against 39 corporations in the industry.

Green Bay's initial reaction to being named as a defendant in these cases was described by Mr. Kress:

> Our management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action lawsuits, we concluded our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in these civil actions. Developments proved this to be a very erroneous conclusions.

Mr. Kress then went on to describe the result of the settlement pressure that was brought to bear on those named in the suits and how those who were indicted settled early.

> Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the civil actions with the plaintiffs. This settling trend ignited a five week "settlement stampede" resulting in many of the defendants entering into settlement agreements with the plaintiffs in the class actions.

Finding that approximately 80 percent of the defendants had settled for over $250 million and that the dollar amount per market share percentage point required to settle had risen steadily with each settlement, Green Bay was given a settlement offer of $3,700,000 per percentage point (total settlement $5.5 million). By contrast, the first defendant to settle paid only $500,000 per point, or 7.5 times less than that offered by the plaintiffs to Green Bay.

Mr. Kress continued:

> Green Bay thereby realized that it faced a monumental decision—pay the $5.5 million settlement, or face the financial risk that it may ultimately be the only remaining defendant who, under the existing law, would be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price-fixing conspiracy. The absence of a right of contribution and claim reduction therefore served to coerce us into a settling posture.
>
> An estimate of the potential damages which might be decided by a court was then necessary in order that a proper assessment of the situation be made.

> Using a variety of assumptions in order to arrive at a feasible damage figure which might ultimately be determined by a jury, we assumed that a damage figure of 5 percent of the total industry annual sales was feasible. Subtracting the settlements already made, and multiplying the results by 2½ times after taxes, we concluded that we must stand ready to bear the burden of a potential legal liability fo from 2 to 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability.

This risk, however, remote, constituted a contingent liability of over $2 billion that would have to be reported to Green Bay's mortgage holders and potential lenders. Since that disclosure might void the company's borrowing power, Green Bay "reluctantly concluded a settlement agreement. . . . " Mr. Kress described the impact of such a catastrophic contingent liability on a small company:

> [L]oss of borrowing power is the killing factor for a small, privately owned corporation involved in a capital intensive industry. A small business such as ours must borrow in order to compete. With a net worth of $70 million, our then current borrowing was in excess of $50 million.

This threat of betting the entire company forced Green Bay into settling instead of defending its innocence, which was confirmed by subsequent events. Mr. Kress noted the outcome of both the *Corrugated Container* criminal prosecution and civil damage trials:

> 1. The criminal antitrust trial resulted in a verdict of not guilty for all defendants who stood trial.
> 2. In the civil action, the jury, after hearing all the evidence in a three month long trial, found that Green Bay Packing, Inc. was not a member of a combination or conspiracy to fix, raise, maintain or stabilize prices of corrugated containers.

Another earlier account of the unfairness of whipsaw settlement pressure came from Mr. Richard Johnson, Chief Executive Officer of the Menasha Corporation, also a defendant in the *Corrugated Container* litigation. Neither Menasha nor any of its employees were indicted, yet it found itself a defendant in the same civil antitrust damages suits as did Green Bay. On the dilemma of either settling the cases or going to trial, Mr. Johnson testified:

> When counsel informed us that we could, because of no contribution, be hurt badly regardless of culpability or size of our sales to this industry, we became alarmed.
> In our calculations, it was evident that if Menasha Corporation were to litigate along with the other defendants and if a conspiracy were found and Menasha were determined to be collectable by the plaintiffs, the company would be assessed damages in excess of $1 billion, we would be bankrupt and our shareholders would have noting from the fruits of their and their ancestor's work.

> With that warning from our counsel, we consulted with our directors and several of the major shareholders to ask their advice and permission to accomplish a settlement.

Mr. Johnson's account described both the plaintiffs' ability to execute a settlement strategy and the resulting unfairness to firms that received less favorable treatment in that strategy.

> Further, we saw companies which have not been as conservatively managed seeking special treatment due to their poverty and in two cases this was recognized and allowed by the plaintiffs and thus additional potential burden was placed upon the more soundly financed companies. We also saw the rash of settlements that ensued and the constant threat by the plaintiffs that unless settlement is made now the price would escalate at the next settlement opportunity. We had little or no information concerning the fact or fiction that had been presented at the Grand Jury concerning us, or any other company which had been subpoenaed; that is, we did not know how strong or weak a case the plaintiffs would have against any of the companies. we were completely in the dark. We could not afford the huge costs of litigating an action of this nature, nor could we bear the risk of not having each party pay their rightful share of an alleged conspiracy, whether actual or imagined.

Mr. Johnson told how he and the other officers and directors had to decide whether to "bet their company" in this litigation:

> With no consideration of merits, Menasha Corporation was given the opportunity by the plaintiffs to settle on a "take it or leave it" basis. We chose to settle and paid $2,750,000 per point and having sold 1.68 percent of the market, we paid a total of $4,600,000. Further, we have to date incurred legal expenses of $651,000 and spent untold hours of executive and staff time. Menasha was found in a civil case not to be a member of the conspiracy. We and all other settling defendants paid a huge insurance permium. There is $300,000,000 in this pool. We did it to save us from possible bankruptcy. (Report of the Committee on the Judiciary on S. 995, 97th Congress, 2d sees., No. 97-359, pp.19-21.)

These situations are the kinds of inequities that should be prevented by the enactment of S. 1300. The evidence before the committee reveals that the whipsaw settlement problem is still present. Witnesses testified that they are currently involved in litigation in which defendants and potential defendants are being subjected to such pressures. One antitrust practitioner gave the following report:

> The plaintiff's counsel sends the chief executive officers of certain companies whose size or share of the market in relationship to the total market affected may be very big or small, but they are given an opportunity to take a sweetheart settlement, what I call a sweetheart settle-

> ment, because it is a settlement lower than those who stay in the case—lower per percentage point of the relevant market.
>
> It was done in this situation. It helps fund the litigation for the plaintiff's counsel. It serves no public service, and it misallocates, completely misallocates, real damages among the defendants to the extent there are any guilty defendants. And it creates an incentive for the remaining defendants to settle because they cannot afford to take on the liability for those settling defendants.
>
> It is a very, very, very vicious thing, and it has no relationship to culpability, and it has no relationship to the size—market share size—of the defendant.

(Testimony of James T. Halverson, Esquire, of Shearman and sterling, New York, New York, before the Senate Committee on the Judiciary, Hearings on S. 2162, April 15, 1986.)

The fact that there is no especially prominent or massive matter in litigation today similar to the recent *Corrugated Container* litigation is a positive feature of the current legislative environment. The Congress has the opportunity to address this serious problem free of the effect of legislation on specific litigation. Therefore, this is a most appropriate opportunity to achieve this much-needed reform.

The claim reduction provision of S. 1300 would avoid the predicaments of Green Bay Packing and Menasha and would assure that non-settling defendants would not face liability for damages caused by settling defendants' damages "left behind" because of low settlement amounts. Under claim reduction, such low settlements would be discouraged, since they would reduce the total liability of all defendants to the plaintiff by the damages attributable to the settling parties.

As a policy matter, it is necessary to balance the goal of quickly resolving antitrust cases, on the one hand, with the rights of those named as defendants to use the courts to assert and defend their innocence, on the other hand. Antitrust defendants should not be denied the opportunity to present their case because of fear of liability for damages caused by other defendants who have settled. Regarding the injustice of coerced settlements in antitrust suits, former Attorney General Griffin Bell testified:

> If you represent someone who get caught up in one of these monstrous suits, and they will tell you all day that they are innocent; you have to finally say to them that there is joint liability and that damages could be a billion dollars. We will say this company is worth $50 million, and they are offering to let you buy out for a million dollars. What are you going to tell your client? To pay. They pay it, and then they are bitter. I know this happens.

While claim reduction offers a solution to the whipsaw settlement problem once the parties to joint conduct have been sued, it does not solve a second inequitable effect addressed by S. 1300 as introduced. Since, under joint and several liability, any one of the parties to allegedly unlawful conduct can be held accountable for

the damages caused by all of the participants, under current practice the plaintiffs can strategically choose which parties to sue, without regard for culpability. Those who are sued face the responsibility for the damages attributable to the entire conspiracy. This selection of defendants can allow other equally culpable parties to escape responsibility altogether. Because there is no right of antitrust law violators to seek contribution from their joint violators, some violators could avoid liability altogether, at the discretion of plaintiffs. This situation can create the same unfair settlement pressure on those who are sued that is brought to bear by the whipsaw settlement patterns described above. For example, the committee heard about the case of Olson Farms, Inc., a purchaser of eggs that was accused by fourteen egg producers of conspiring with four other purchasers to fix the price paid to the producers. Of the five alleged co-conspirators, Olson Farms was the smallest firm but was singled out for suit by the plaintiffs. The damages claimed against Olson Farms were $99,656, on purchases which amounted to about 11 percent of the eggs purchased by the five alleged conspirators. Nevetheless, Olson Farms was held accountable for three times the damages found to have been caused by all of the wrongdoers, and the firm eventually had to satisfy a judgment in excess of $2.4 million.[1] Olson Farms was unsuccessful in seeking contribution from the other alleged co-conspirators, and bore liability over 20 times its own share of the damages.[2]

In 1981, the Supreme Court confirmed that the federal courts may not provide defendants a right of contribution in antitrust cases. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981). Thus, in the 97th Congress, consideration was given to legislative creation of a right of contribution, in addition to claim reduction for settlements. While there was substantial support for reforming the system of private antitrust remedies by providing for claim reduction and contribution among defendants, and although the committee favorably reported such reforms in S. 995, disagreement over an effective date proved to be a major obstacle to enactment of S. 995.

Today, there is a strong consensus that S. 1300 offers the best solutions to the dual problems of the whipsaw settlement pressure and the abusive and unfair selection of defendants, without involving the issue of contribution. In the case of settlement, S. 1300 will reduce the amount of the total damage claim against the named defendants in all types of antitrust suits by the greatest of a) any amount stipulated for claim reduction, b) the amount paid for settlement, of c) the damages allocable to the settling party. S. 1300 solves the selection-of-defendants problem simply by presuming in horizontal conspiracy cases that the plaintiff has released from liability any person who could have been but has not been made a party to the action and whose sales or purchases would otherwise be included in the damage calculation. This will encourage plaintiffs to sue any co-conspirators from whom they want to recover damages.

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[1] *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F. 2d 242 (10th Cir. 1976), cert. denied, 429 U.S. 1122 (1977).

[2] *Olson Farms Inc.* v. *Safeway Stores, Inc.*, 649 F. 2d 1370 (10th Cir. 1979).

In horizontal price-fixing conspiracy cases, the amount by which the claim will be reduced can be measured by the settling conspirator's proportionate share of the total of all the competitor's overcharges or underpayments, i.e., according to the settling party's share of the affected sales or purchases. In horizontal price-fixing cases, the reduction of the total claim for failure to join a co-conspirator will be made on the same basis. Claim reductions in antitrust cases other than horizontal price-fixing conspiracies shall be made by the courts on the basis of the relative responsibility of the settling defendant in the antitrust violation and the relative benefits derived by that defendant. In the latter class of cases, if the court decides that it would be more equitable to reduce the claim by the settling party's proportionate share of the affected sales or purchasers, it may do so.

The evidence before the committee indicates that the proportionate shares of total damages caused by each defendant in a horizontal price-fixing case should not be difficult to determine for purposes of claim reduction. No additional complexity will be created in any case of the claim reduction provision of S. 1300. The market shares of each defendant, determined by sales or purchases, are virtually always part of the basic record in horizontal price-fixing cases. As former Judge and Deputy Attorney General Charles B. Renfrew testified:

> Claim reduction will not add any new cases to the courts' dockets, add new parties or create new complexities. The calculation by which a plaintiff's claim must be reduced will be set forth in the record, and in almost all horizontal price-fixing cases will be the market shares or sales volume of the various defendants. (Statement of Judge Charles B. Renfrew, Committee on the Judiciary, Hearing on S. 995, February 10, 1982)

Other antitrust attorneys have testified that there should be no difficulty in determining the damages fairly allocable to individual defendants:

> Sales of each defendant are well known. They have computerized records. Even if the plaintiffs do not know from whom they bought or what the total volume of sales is, the defendants know and that is readily ascertainable. (Testimony of Robert Joffe, Esquire, on behalf of the Association of the Bar of the City of New York, Committee on the Judiciary, Hearings on S. 995)

In cases in which the amount of claim-reduction shares are not ascertainable by using the sales-based formula, the courts will determine the appropriate amount. The rationale behind giving courts the option of using the alternative, relative benefit-relative responsibility formula is that a sales-based formula is not appropriate for all cases, not even for all horizontal conspiracy cases. For example, in any conspiracy in which some of the participants failed to make any sales—such as bid-rigging—the sales-based formula may not yield appropriate results or proper justice.

As noted above, it is the view of the committee that S. 1300 as reported will not significantly reduce, and may likely increase, the

deterrent force of the private antitrust remedies system. Under the rule of joint and several liability, each defendant is liable not only for damages attributable to its own conduct but those attributable to the conduct of all co-conspirators as well. S. 1300 would not change the principle of joint and several liability. What it should change, however, is the current ability of a co-conspirator to avoid completely any responsibility for the injury it causes, by changing the incentives of plaintiffs to sue or not sue co-conspirators for whose conduct they seek to recover damage awards. Those who believe that claim reduction will actually increase deterrence believe that it will help insure that all participants in a conspiracy will be held accountable for at least some damages, and probably damages closely approximating the proportionate share of damages caused by each conspirator. The current system of incentives that allows some to escape liability entirely or on the basis of disproportionately low settlements may encourage some persons to believe that they will get off cheaply. S. 1300 would make it more likely that antitrust violators would be held accountable for damages, while it would also reduce the unfair whipsaw settlement pressure.

S. 1300 as introduced would have eliminated joint and several liability and held antitrust violators responsible for three times the damages attributable to their own sales or purchases. While the Department of Justice acknowledged the whipsaw settlement problem, the Department expresses the opinion that it would be undesirable to eliminate joint and several liability, since joint and several liability may be an important element in the deterrence of potential antitrust violators. Later, the Administration forwarded legislative proposals that were introduced as S. 2162 by Senator Thurmond. S. 2162 contained, among other features, a claim reduction proposal for solving the whipsaw settlement problem. After introduction of S. 2162, hearings were held comparing S. 1300 and S. 2162. The Department of Justice and several other witnesses responded to the suggestion by Senator Thurmond that the goals of S. 1300 could be achieved by a modification of the claim-reduction provision in S. 2162. Mr. Douglas H. Ginsburg, Assistant Attorney General for the Antitrust Division, took the position that claim-reduction would be preferable to the elimination of joint and several liability, but agreed that claim reduction should be modified to require plaintiffs to join as defendants culpable parties whose sales would be included in their damage calculations or else face reduction of their claims by the fair share of damages attributable to such parties. Assistant Attorney General Ginsburg testified:

> In fact, our assessment of the relative costs and benefits of claim reduction as a solution to the whipsaw problem—in terms of deterrence and increased burdens on the judicial system—has largely assumed that plaintiffs will typically sue all culpable parties. Thus, such a modification really would not change what we believe to be the best solution to the fairness concerns that have been raised as a result of the joint and several liability antitrust damages rules, but would alleviate any unfairness problem plaintiffs could create by suing only some of the appropriate defendants. (Statement of Douglas H. Ginsburg, Assistant Attorney

General, Antitrust Division, Hearings before the Committe on the Judiciary, April 15, 1986.)

Accordingly, in the mark-up on Senator Thurmond offered as a substitute for S. 1300 a compromise that modified the Administration's claim reduction proposal to address both the abuses to which S. 1300 was addressed, but without eliminating joint and several liability. The compromise, which was adopted as a substitute by the committee, enjoys even broader support among members of the committee than did the original S. 1300. (See the additional views of Senator Leahy.)

IV. Committee Action

The committee conducted two days of hearings on S. 1300: July 29, 1985, and April 15, 1986. S. 1300 was reported out of the committee as amended on May 8, 1986, by roll call vote, as follows:

YEAS (16)	NAYS (2)
Thurmond	Kennedy
Mathias	Metzenbaum
Laxalt	
Hatch	
Simpson	
East	
Grassley	
Denton	
Specter	
McConnell	
Biden	
Byrd	
DeConcini	
Leahy	
Heflin	
Simon	

Prior to final passage, Senator Thurmond offered the following compromise amendment in the nature of a substitute to S. 1300:

Strike out all after the enacting clause and insert in lieu there of the following:

The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 4H the following new section:

> Sec. 4I. (a)(1) The court shall reduce the claim under section 4, 4A, or 4C of this Act of any claimant releasing any person from liability or potential liability for such claim by the greatest of: (a) any amount stipulated for this purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released from liability or potential liability (or treble such actual damages to the extent such claim is for treble damages) and any interest on such actual damages under section 4, 4A, or 4C of this Act.
>
> (2) In any action under section 4, 4A, or 4C of this Act based on a contract, combination, or conspiracy among competitors, the court shall conclusively presume that any

person whose sales or purchases would otherwise be included in a calculation of damages based on overcharges or underpayments has been released from liability or potential liability if it has not been joined as a defendant, unless such person is legally or practically unavailable as a party to the action to recover such damages.

(b) For purposes of subsection (a):

(1) Where the claim is based upon a price fixing agreement among competitors and damages are sustained by reasons of overcharges or underpayments resulting from such agreement, damages shall be allocated on the basis of each such competitor's proportionate share of the total of all such competitor's overcharges or underpayments in the market affected.

(2) With respect to all other claims, damages shall be allocated on the basis or relative responsibility for the origination of perpetration of the violation for which damages are being awarded and the benefits derived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages by the method used in paragraph (b)(1).

(c) Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws.

The provisions of the Act shall apply to all actions commenced under section 4, 4A or 4C of the Clayton Act after the date of enactment of this Act.

Senator Simon made a motion to amend the Thurmond substitute as follows:

In subsection (b)(1), strike the last four words "in the market affected".

The Simon amendment to the Thurmond Substitute was adopted by a voice vote.

Senator Metzenbaum offered an amendment to the Thurmond substitute as follows:

Add a new section (d):

This section shall not apply if such person's liability has been previously established by—

(a) a conviction, a plea of guilty, or plea of nolo contendere to a violation of the antitrust laws or similar State laws;

(b) a prior judgment in any State or Federal proceeding that would preclude such person from relitigating the issue or liability; or

(c) an order from a State or Federal administrative agency which include a finding of liability.

This amendment to the Thurmond substitute was defeated by roll call vote, as follows:

YEAS (4)	NAYS (11)
Mathias	Thurmond
Kennedy	Laxalt
Metzenbaum	Hatch
Simon	Simpson
	Grassley
	Denton
	Specter
	McConnell
	DeConcini
	Heflin

Senator Metzenbaum then offered the following amendment to the Thurmond substitute:

Add a new section (d):

> Solely for purposes of determining whether a class action may be maintained pursuant to Rule 23 of the Federal Rules of Civil Procedure, the court shall proceed in any case as if all defendants are jointly and severally liable for any damages proven to have resulted from an alleged unlawful contract, combination, or conspiracy.

Senator Thurmond offered, and Senator Metzenbaum accepted, the following substitute for the Metzenbaum amendment:

At the end of line 20, page 2, strike the period at the end of subsection (c) and add:

> , and nothing in this section shall affect whether or not an action may be maintained as a class action under rule 23(b) of the Federal Rules of Civil Procedure.

The Thurmond-Metzenbaum amendment to the Thurmond substitute then passed by voice vote.

Senator Metzenbaum next offered the following amendment to the Thurmond substitute:

Add a new section (d):

> This section shall not apply in the case of a person who is released from a claim of liability in return for agreeing to provide testimony relating to the alleged liability of other participants in the alleged contract, combination, or conspiracy. In such case, the sales of the person who is released shall be attributed to such other participants based on total sales of each to the plaintiff.

This Metzenbaum amendment was defeated by roll call vote, as follows:

YEAS (4)	NAYS (11)
Specter	Thurmond
Kennedy	Mathias
Metzenbaum	Laxalt
Simon	Hatch
	Simpson
	East
	Grassley
	Denton
	McConnell
	DeConcini
	Heflin

Senator Metzenbaum then offered an amendment to the Thurmond substitute, as follows:

Add a new section (d):

> A defendant who disputes a claim by the plaintiff that he is unable to recover from a person shall be required to establish that the person is capable of satisfying a judgment for a substantial share of plaintiff's damages attributable to such person.

Senator Thurmond offered, and Senator Metzenbaum accepted, the following substitute for the Metzenbaum amendment:

Strike out subsection (a)(2) and insert in lieu thereof the following:

> (2) In any action under section 4, 4A, or 4C of this Act based on a contract, combination, or conspiracy among competitors, the court shall conclusively presume that any person whose sales or purchases would otherwise be included in a calculation of damages based on overcharges or underpayments has been released from liability or potential liability if it has not been joined as a defendant and if it is established by the defendant that such person is legally or practically available as a party to the action to recover such damages.

This Thurmond-Metzenbaum amendment was then passed by voice vote.

The Thurmond amendment in the nature of a substitute for S. 1300 was then passed as amended by roll call vote, 16–2, as noted.

V. Section-by-Section Analysis

Section 4I., subsection (a)(1) of the bill establishes a statutory right of claim reduction. Currently, defendants in an antitrust suit may be jointly and severally liable for all of the provable damages resulting from the violation; thus, for example, a defendant in a price-fixing case may be liable for damages attributable not only to its own sales to the plaintiff or plaintiffs, but also for the sales of all co-conspirators, whether or not they are also defendants. Accordingly, if one or more defendants settle a price-fixing case with-

out obtaining an agreement from the plaintiff not to seek treble damages resulting from the settling defendants' sales, the remaining defendant or defendants, if found liable, may be liable to the plaintiff for damages resulting from the settling defendants' sales as well as their own. Subsection (a)(1) of the bill is designed to eliminate from a plaintiff's total recoverable damages that portion of damages attributable to any defendant with whom it has settled.

Subsection (a)(1) sets forth the manner for reducing the share of defendant's liability when plaintiffs in any antitrust case have settled with fewer than all of the persons subject to joint and several liability for the same violation. A case would not have to come to final judgment for the claims reduction formula in subsection (a)(1) to be activated. For example, in a price-fixing case where there are three defendants and on plaintiff, and plaintiff settles with D1, the amount of damage based on D1's sales to the plaintiff would be deducted from the plaintiff's claim and would be out of the case. In a class-action suit where there are many members of plaintiff class and ten defendants, and the plaintiffs settle with D1, the amount of damage based of D1's sales to the plaintiff class would be deducted from the plaintiff's claim and would be out of the case.

Subsection (a)(1) would require a reduction of the plaintiff's award by the greatest of:

(1) *Any amount stipulated by the release.*—Thus, if the plaintiff and defendant agree that, in exchange for reaching a settlement or covenant not to sue, the plaintiff will reduce its claim against the remaining defendant or defendants by a certain amount and stipulate that amount in the release or covenant, that amount will be deducted from the plaintiff's award if it is the greatest of the three sums set forth in subsection (a)(1).

(2) *The amount of consideration paid for the release.*—Whatever amont the defendant actually pays the plaintiff in exchange for a settlement or an agreement not to sue will be deducted from the plaintiff's award if it is the greatest of the three sums set forth in subsection (a)(1).

(3) *The damages (actual or treble) fairly allocable to the settling person's sales or purchases of goods or services.*—This amount represents the damages (actual or trebled) suffered by the plaintiff as a result of the conduct of the settling defendant. Under current law, there are some circumstances in which the antitrust damages provided by statute are actual damages; those situations include suits by the United States and suits under the National Co-operative Research Act. In other circumstances, the damages provided by statute are three times the injury sustained by the plaintiff as the result of the defendant's conduct. "Interest on such actual damages" is referred to in subsection (a)(1)(3); such interest on antitrust damage awards is now available in certain circumstances. This provision would also be consistent with a proposal contained in another bill, S. 2162, to provide prejudgment interest on actual damages in certain antitrust suits, if that bill is enacted.

Two methods of determining the damages fairly allocable to a settling defendant are set forth in subsection (b) of the bill. Those methods are described below. In any event, this sum would be deducted from the plaintiff's claim, if it were greater than (1) or (2), to calculate the plaintiff's remaining claim or award. Although the

whipsaw settlement abuse arises most often in horizontal agreement cases, the claim reduction provision of subsection (a)(1) is not confined to horizontal agreement cases but applies in all types of antitrust cases.

Subsection (1)(2) requires that in a horizontal agreement case the court shall conclusively presume that any person who has not been made a party to the action, whose sales or purchases would otherwise be included in the plaintiff's damage calculation, and who is shown by the named defendants to be legally and practically available as a party to the action, has been released from liability by the plaintiff. This subsection is an important provision of the bill intended to correct an inequity that can arise from the plaintiff's selection of defendants in a case alleging a horizontal agreement.

The whipsaw settlement pressure described earlier in this report can be brought to bear on some defendants if the plaintiffs simply decline to sue all potentially liable parties in horizontal conspiracy cases. The imputed claim reduction provision in subsection (a)(2) of S. 1300 would close this loophole and prevent plaintiffs from leaving particular defendants unsued for purely tactical purposes of "whipsawing." It would not alter the principle of joint and several liability, since all those who participated in a horizontal conspiracy would be jointly and severally liable for the total damages caused by all of the co-conspirators; but where the plaintiffs do not sue a co-conspirator whose sales or purchases would otherwise be included in the calculation of the total damage claim against those sued, it shall be presumed that such unsued co-conspirator has been released from the joint and several liability. As with claim reduction, those who are sued remain jointly and severally liable for the total damages allocable to them.

This presumption that an unsued co-conspirator has been released from liability depends on the legal or practical availability of such an unsued co-conspirator to be a party to the action to recover damages. If an unsued co-conspirator is available as a party to the action, then the plaintiff has full recourse for damages attributable to that co-conspirator, since the plaintiff can sue that party to recover damages wherever jurisdiction lies within the statute of limitations. Thus, the operation of the imputed claim reduction provided in subsection (a)(2) should not affect the plaintiff's ability to recover full compensation for any injury it has sustained. It would not penalize plaintiffs who fail to join as defendants persons who are legally or practically unavailable as parties in the suit. It is the intention of the committee that in any dispute as to whether an unsued co-conspirator could have been named as a party-defendant, the burden is on the defendant or defendants to establish that such co-conspirator is legally and practically available as a party to the action to recover damages. Examples of persons that might be legally or practically unavailable would include persons beyond the jurisdiction of the court and defunct co-conspirators without successors.

The imputed claim reduction provision in Section 4I.(a)(2) applies only to horizontal agreements. The language of the bill calls for a release or carve-out from the plaintiff's claim if an unsued company's sales or purchases would otherwise be included in a calculation of damages. The carve-out would not apply, by definition, to

vertical cases in which the suits are to recover lost profits. For example, if a plaintiff dealer claimed that a manufacturer terminated it as part of a conspiracy with other dealers, the imputed claim reduction would not apply to the plaintiff's decision not to sue the other dealers, because the plaintiff's claim for damages is for lost profits and has nothing to do with sales of the other dealers; the sales of the other dealers would not "otherwise be included" in the plaintiff's claim.

The imputed claim reduction provision of subsection (a)(2) also does not apply to unsued persons who may have caused overcharges to the plaintiff but who were not involved in the horizontal agreement that is the subject of the suit. The committee discussed the theory of "umbrella-pricing damages" in antitrust cases. This theory suggests that companies that sell to plaintiffs may be able to raise their prices to the plaintiff because of a price-fixing conspiracy by others (the party-defendants); that is, price-fixing conspirators agree to raise their prices on certain products and nonconspirator sellers of the same products are able to raise their prices under the "umbrella" of the price-fixers' higher pricing level, causing injury to the plaintiff. This theory of damages is not judicially recognized, and it involves significant speculation. Nonetheless, in the event that a plaintiff were permitted by a court and able to prove that such damages flowed from the horizontal conspiracy among named defendants, the language of the bill would not preclude the plaintiff from recovering such damages from the defendants merely because the plaintiff did not sue the non-conspirator seller. This is because the carve-out or presumption of release in subsection (a)(2) applies to the sales of unsued persons (whose sales would otherwise be included in a calculation of damages based on overcharges) only if those persons are "legally or practically available" as parties to the action. By definition, sellers of high-priced goods who were not participants in a conspiracy, and therefore not wrongdoers, are not legally available as parties to the action arising from the conspiracy.

Subsection (b) provides the methods by which the claim reduction amount under subsection (a)(1) and the imputed claim reduction amount under subsection (a)(2) shall be determined. *Subsection (b)(1)* provides that where the claim is based upon a price-fixing agreement among competitors and damages are sustained by reasons of overcharges or underpayments resulting from such an agreement, damages shall be allocated for both claim reduction and imputed claim reduction on the basis of each competitor's proportionate share of the total of all the price-fixing competitors' overcharges or underpayments on the affected goods or services. The bill would require courts to use a sales-based claim reduction formula in all cases involving horizontal price-fixing agreements among competitors—where it is universally conceded that such a formula would work and is appropriate—to reduce uncertainty concerning claim reduction calculations in that area.

It is the committee's belief that the evidence necessary to make such calculations will be available in such suits. In horizontal price-fixing cases, the sales of each co-conspirator will be contained in the record as basic evidence. Claim reduction will not add any new complexities to such litigation.

The following example illustrates the way in which subsection (b)(1) might be applied:

Plaintiff (P) sues several manufacturers of product (M) for price-fixing, alleging actual damages of $110 million resulting from its purchases of price-fixed M's. P settles with defendant D for $1 million. At trial, P proves that D and the other defendants fixed prices, that its total damages were $110 million, and that P bought $10 million of its M's from D. Three times the actual damages attributable to D's sales would be deducted from P's award. Thus, P would be entitled to $330 million ($110 million trebled) minus $30 million ($10 million trebled) or $300 million as a judgment against the remaining defendants. However, if P is the United States and can collect only actual damages, the judge would deduct $10 million from $110 million, leaving $100 million as the judgment. The results would be predictable and they would protect nonsettling defendants against unfair settlements without discouraging settlements or complicating antitrust litigation.

Subsection (b)(2) provides a formula for determining the amount of claim reduction or imputed claim reduction with respect to claims other than those based on a price-fixing agreement among competitors where damages are sustained by reason of overcharges or underpayments. Under (b)(2), damages shall be allocated on the basis of 1) the relative responsibility for the origination or perpetration of the violation for which damages are being sought and 2) the relative benefits derived from the violation, unless the court determines that it would be more equitable to allocate damages by the method described in (b)(1). It is the intention of the committee that the sales-based claim reduction formula contained in subsection (b)(1) be used by the courts to the greatest extent possible. The option of allocating damages by the relative responsibility/relative benefit formula described in (b)(2) has been provided, however, even for use in some horizontal conspiracy cases. This is because a sales-based formula may not yield appropriate results in all horizontal agreement cases. For example, in any horizontal conspiracy in which some of the conspirators failed to make any sales before being detected—such as in bid-rigging (which we are distinguishing here from price fixing)—the sales-based formula in (b)(1) might permit wrongdoers to escape responsibility. The courts are to use the sales-based formula in all horizontal price-fixing conspiracy cases. In other kinds of cases, the courts ae given the option of using the relative responsibility/relative benefit formula in (b)(2) or the sales-based formula to produce a just and fair result.

Subsection c confirms that the principle of joint and several liability is preserved. Those defendants who are sued are jointly and severally liable for the damages allocable to all of them, and if any of the defendants go through a trial and have judgment rendered against them, they are jointly and severally liable to the plaintiff for the total amount of the judgment.

Subsection c also indicates that this bill shall not affect whether or not action may be maintained as a class action under Rule 23(fb) of the Federal Rules of Civil Procedure. Under Rule 23(b), one of the criteria used by the courts is the certification of class action suits is whether the claims of parties seeking to be representatives of a class are "typical" of the claims of the members of the class. It

is the understanding of the committee that this bill will not affect the determination whether an action should be maintained as a class action.

Finally, the bill makes clear that it applies only prospectively; it shall apply to all actions commenced under section 4, 4A or 4C of the Clayton Act after the date of enactment of the bill.

VI. Executive Communication

U.S. Department of Justice,
Antitrust Division,
Washington, DC, April 16, 1986.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: This letter is in response to your letter of April 15, 1986, requesting the Administration's views on a modified version of Title IV of S. 2162, the "Antitrust Remedies Improvements Act of 1986." Title IV provides a right of claim reduction in antitrust litigation: the remaining claim of a plaintiff in an antitrust action would be reduced by at least the share of the plaintiff's claim fairly allocable to any person who has been released from liability for the plaintiff's injury.

Your modified version would amend S. 2162 in two ways. First, in a case involving a horizontal conspiracy, it would require that the court conclusively presume that any person who has not been made a party to the action and whose sales or purchases would otherwise be included in the plaintiff's damage calculation has been released from liability by the plaintiff unless such person is legally or practically unavailable as a party. Second, it would amend subsection (b)(1) to require courts to use a sales-based formula for calculating claim-reduction shares in cases involving horizontal price-fixed agreements. The Administration supports your modified version.

The first amendment is fully consistent with the Administration's claim reduction proposal. The primary purpose of this proposal is to eliminate the possibility of unfair whipsaw settlements that can deprive defendants of the opportunity of litigating their liability. Since the introduction of S. 1262, however, it has been brought to our attention by members of the antitrust bar that it might be possible for the whipsaw problem to continue should plaintiffs simply decline to sue all potentially liable defendants in horizontal conspiracy cases. The imputed claim reduction amendment in your modified verson of Title IV of S. 2162 would close this potential loophole and prevent plaintiffs from leaving particular defendants unsued for purely tactical, whipsaw purposes. It would not penalize plaintiffs who fail to join as defendants persons who are legally or practically unavailable as parties or alter the principle of joint and several liability, and thus would be entirely consistent with the Administration's claim reduction proposal.

Regarding the second amendment, it is also our intention that the sale-based claim reduction formula contained in subsection (b)(1) be used by the courts to the greatest extent possible. The rationale behind giving courts the option of using the alternative, rel-

ative benefit-relative responsibility formula contained in subsection (b)(2) in a horizontal conspiracy case was that a sales-based formula is not appropriate for all horizontal conspiracies. For example, in any conspiracy in which some conspirators failed to make any sales—such as bid-rigging—the sales—based formula in (b)(1) might not yield appropriate results. Our intention in drafting our proposal as we did was to encourage courts to use the sales-based formula for all of the cases covered by subsection (b)(1), but to give courts the option of using (b)(2) where necessary to produce a fair result.

The proposed amendment to (b)(1) in your modified version of Title IV of S. 2162 would require courts to use a sales-based claim reduction formula in all cases involving horizontal price-fixing agreements among competitors—where it is universally conceded that such a formula would work and is appropriate—to further reduce uncertainty concerning claim reduction calculations in that area, and would permit courts to choose between the (b)(1) and (b)(2) formulae in all other cases. Thus, this amendment also would be entirely consistent with the Administration's claim reduction proposal.

To summarize, the Administration supports your proposed modified version of Title IV of S. 2162.

Sincerely,

DOUGLAS H. GINSBURG,
Assistant Attorney General.

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee has concluded that the Act will have no direct regulatory impact.

VIII. ESTIMATED COST OF LEGISLATION

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 30, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1300, a bill to provide for antitrust violators to be subject to individual responsibility for treble the amount of damages attributable to their violations, and to assure fairness in the allocation and award of antitrust damages, as ordered reported by the Senate Committee on the Judiciary, May 8, 1986.

S. 1300 amends the Clayton Act by inserting a new section that limits the proportion of total damages for which any one defendant in an antitrust case would be liable. In a price fixing case, damages would be allocated in proportion to the share of overcharges or underpayments, while in other cases, damages would be allocated on

the basis of relative responsibility for the violation. CBO estimates that enactment of this legislation would result in no significant cost to the federal government or to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1300, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 15—COMMERCE AND TRADE

* * * * * * *

CLAYTON ACT

* * * * * * *

SECTION 4—SUITS BY PERSONS INJURED

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§ 4H. Applicability of parens patriae actions

Sections 15c, 15d, 15e, 15f, and 15g of this title shall apply in any State, unless such State provides by law for its nonapplicability in such State.

(Oct. 15, 1914, c. 323, § 4H, as added Sept. 30, 1976, Pub. L. 94-435, Title III, § 301, 90 Stat. 1396.)

§ 4I. Allocation of damage awards

(a)(1) The court shall reduce the claim under section 4, 4A, or 4C of this Act of any claimant releasing any person from liability or potential liability for such claim by the greatest of: (1) any amount stipulated for this purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released from liability or potential liability (or treble such damages to the extent such claim is for treble damages) and any interest on such actual damages under section 4, 4A, or 4C of this Act.

(2) In any action under section 4, 4A, or 4C of this Act based on a contract, combination or conspiracy among competitors, the court shall conclusively presume that any person whose sales or purchases would otherwise be included in a calculation of damages based on overcharges or underpayments has been released from liability or potential liability if it has not been joined as a defendant and if it

is established by the defendant that such person is legally or practically available as a party to the action to recover such damages.

(b) For purposes of subsection (a):

(1) Where the claim is based upon a price fixing agreement among competitors and damages are sustained by reason of overcharges or underpayments resulting from such agreement, damages shall be allocated on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments.

(2) With respect to all other claims, damages shall be allocated on the basis of relative responsibility for the origination or perpetration of the violation for which damages are being awarded and the benefits derived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages by the method used in paragraph (b)(1).

(c) Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws, and nothing in this section shall affect whether or not action may be maintained as a class action under rule 23(b) of the Federal Rules of Civil Procedure.

The provisions of this Act shall apply to all actions commenced under section 4, 4A or 4C of the Clayton Act after the date of enactment of this Act.

X. Vote of the Committee

On May 8, 1986, with a quorum present, by roll call vote of 16 yeas and 2 nays the Committee on the Judiciary ordered S. 1300 as amended favorably reported.

XI. ADDITIONAL VIEWS OF MR. LEAHY

My chief concern throughout the Committee's consideration of S. 1300, Title IV of S. 2162, and other proposals to address the allocation of antitrust damages, has been the rights of innocent defendants. The application of current law which includes the remedy of joint and several liability without contribution and without claim reduction, has had a perverse "whipsaw" effect on those antitrust defendants who maintain their innocence. That result necessitates prompt Senate action.

Under current law, all defendants are jointly and severally liable for the total amount of an antitrust plaintiff's treble damages. The threat of joint and several liability is a strong deterrent. Deterrence is a key element of antitrust enforcement, and joint and several liability is an especially appropriate remedy for antitrust violations because the success of a scheme depends on the participation of all co-conspirators. An antitrust scheme does not work without the participation of all those involved. Thus, each member of an antitrust conspiracy is responsible for all of the resulting damages.

The effectiveness and continued need for private damage actions is beyond dispute. Nevertheless, the current process by which damages are allocated, operates so much to deter defendants from pursuing their defenses—even the most meritorious defenses—that this compromise proposal for reform is needed. The way current settlement practices work, once the plaintiff settles with any defendant, his remaining claim is reduced only by the amount of the settlement, not by the fair share of the damages allocable to the settling defendant or defendants. This encourages the most active members of an antitrust conspiracy to settle early and cheaply. Often these settlements represent "sweetheart" deals. The practical result is to force innocent defendants who otherwise would pursue their legal and factual claims to trial, to abandon those claims and settle rather than risk bankruptcy through a "bet the company" trial.

As the Justice Department said in responding to my questions during the hearings on this legislation:

> The current joint and several liability and other damage rules . . . can indeed induce defendants in an antitrust case to seek early settlements with the plaintiff, in the hope that the plaintiff will accept relatively small amounts, perhaps to finance the litigation or in return for assistance in its prosecution. Both parties to such a settlement realize that under existing law, the plaintiff will be able to shift the burden of paying the rest of the damages attributable to the settling defendant's sales to the remaining defendants. It is reasonable to assume that defendants

> against whom the plaintiff's case is the strongest, or who are responsible for large portions of the damages, would have the greatest incentives to negotiate early, favorable settlements. . . .
>
> We are informed that the risk of treble damage liability, particularly in large, industry-wide class action cases, can be so great as to make a defense on the merits impossible where "sweetheart" settlements have eliminated other defendants as potential co-payors of plaintiff's judgment. Given the inherent uncertainties of litigation, and the fact that damages calculated on the basis of industry-wide overcharges may dwarf the net worth of some defendants, claims that firms will settle rather than "bet the company" on even a meritorious defense appear quite credible.

I opposed S. 1300 as originally introduced by Chairman Thurmond because its elimination of joint and several liability would have had a drastic negative impact on deterrence. Such proposals, based on the concept of individual responsibility, tell business people contemplating an antitrust violation exactly what their companies' liability will be, or gives them a formula for assessing the risk of violating our antitrust laws up front. This is unacceptable.

In contrast, the compromise we were able to work out retains joint and several liability, while allowing claim reduction to minimize the unfair "whipsaw" effect. It strikes the proper balance of reinforcing deterrence while protecting innocent defenants.

The opponents of the S. 1300 substitute argue that the Judiciary Committee made a mistake in addressing the allocation of damages and fairness among price fixers or antitrust violators. I believe that price fixers and all violators of our antitrust laws should be prosecuted. However, the opponents' argument that we should not concern ourselves with fairness among price fixers or antitrust violators is based on a false premise. It is based on the premise that all of the allegations in an antitrust complaint are true. It assumes, that once someone is accused of participating in a price fixing or other antitrust scheme he has, in fact, done so. This is not the case.

In our judicial system, all defendants deserve their day in court. This bill will allow those defendants who want to pursue their legal and factual claims from being steamrolled into settling just because of the settlement strategy of the other defendants and the plaintiff. At the same time, the threat of joint and several liability remains to deter anticompetitive conduct.

PATRICK J. LEAHY.

XII. MINORITY VIEWS OF MESSRS. METZENBAUM AND KENNEDY

The modified version of S. 1300 reported favorably by the Committee seriously undermines enforcement of the antitrust laws against criminal price-fixing. By radically changing the rules for assessing damages against those who violate the antitrust laws, the bill reduces deterrence of misconduct, imposes unfair burdens on the injured plaintiff, and promotes litigation.

REDUCTION OF DETERRENCE

The Department of Justice testified strongly against the original version of S. 1300 in large part on the ground that it reduced deterrence by eliminatig joint and several liability for antitrust violations. On July 29, 1985, the Department's representative testified to the Committee:

> . . . eliminating joint and several liability likely would reduce deterrence . . . It is our position that this undesirable effect of S. 1300 clearly outweighs the arguably beneficial effect of reducing individual defendants' damage exposure—a benefit that would, in any event, accrue primarily to culpable individuals who had intentionally participated in criminal conspiracies.

The Department also stated a general concern about changing damage allocation rules in a way that reduced penalties for criminal price-fixers:

> . . . to the extent a change in damage allocation rules provides relief to businesses engaged in felonious antitrust activities as opposed to those businesses engaged in competitively ambiguous conduct subject to the rule of reason, that change will affect only conduct that has no merit and *cannot be overdeterred.* (emphasis added) (See testimony of Charles Rule, Acting Assistant Attorney General for the Antitrust Division before the Committee on the Judiciary, July 29, 1985.)

Despite these strong statements, the Committee has recommended, and the Department has now acceded to, a bill that would violate the principles advocated by the Department. S. 1300 reduces an antitrust defendant's liability—and consequently deterrence—through two basic provisions: 1) if the plaintiff fails to join a potential defendant, his claim is reduced by that person's share of total sales or, in some cases by a more complex measure based on culpability and benefit from the conspiracy; and 2) if the plaintiff settles with a defendant, his claim is reduced by that person's market share even if the settlement provides for a much smaller portion of the claim.

The result of these rules is that the defendant will rarely be exposed to liability for more than his share of the sale to the injured party, even if it is the person primarily responsible for the conspiracy and the largest firm in the industry. In a case where a price-fixer is willing to litigate to final judgment, he will no longer be subject, as now, to the unsatisfied part of the plaintiff's claim. Instead, the maximum liability to the plaintiff will have been substantially reduced by the market shares of all other persons who settled or were not joined as defendants. As a result, persons guilty of serious criminal conduct would be subject to substantially lessened penalties for their violation.

No persuasive case has been made that defendants who are now subject to joint and several liability for all of the plaintiff's claim should be entitled to such a drastic lessening of potential liability. Historically, the law has subjected each defendant to the entire damages from the criminal enterprise, in part because of the need for a strong deterrent and in part because the defendant failed to prevent the conspiracy through refusing to participate and notify responsible law enforcement officials. The Committee bill abandons this historical standard.

The bill purports to retain joint and several liability through preserving two theoretical cases where a defendant might be liable for all the plaintiff's damages. First, in the event a judgment is rendered against several defendants, the plaintiff could in theory choose to collect a disporportionate amount against one of the defendants. Second, in the case where a potential defendant is not joined but is not "legally or practically available as a party," the plaintiff's claim is not reduced and damages attributable to that person are allocated to the joined defendants. These exceptions do little, however, to mitigate the overall impact of reducing deterrence.

In the case where a judgment is rendered against multiple defendants, the defendants are likely to arrive at a voluntary cost-sharing arrangement which reflects their individual market shares. Therefore, there will rarely be any case where a single defendant pays all the plaintiff's damages. In the case of the exception for parties who are not "legally or practically available," the circumstances under which it will be invoked are extremely unclear, as explained further below. Moreover, it is reasonable to assume that a plaintiff will typically be forced to name as many potential defendants as possible even if the added burdens of litigation costs are not justified and even if the potential defendants are close to insolvency. Consequently, the maximum liability of any single defendant will be reduced to its share of the conspiracy.

As a result, the practical effect of these new damage allocation rules is very close to eliminating joint and several liability altogether. Price-fixers will know that they will rarely be subject to exposure greater than their market share. In addition, the added burdens on the plaintiff, as explained further below, make it less likely violators will be sued in the first place. The overall effect is to signal those who want to risk fixing prices that it may now be worth it since the penalties are drastically reduced.

Undercutting joint and several liability in the case of antitrust damages is also a dangerous precedent for other areas of the law

where joint and several liability is now the rule. Individual defendants are now joint and severally liable in most cases for personal injuries from negligence, product liability, dumping of toxic wastes and other types of conduct. There is little doubt that potential defendants in these cases will use the example of S. 1300 as a precedent to argue that joint and several liability rules should be changed for them as well.

PROMOTING LITIGATION

The bill promotes litigation in a number of ways. First, it discourages early settlements. Under current law, defendants are encouraged to settle at an early stage in the litigation. Plaintiffs are now able to accept settlements with defendants who either cannot satisfy a large judgment or cannot afford litigation. Plaintiffs can afford to settle because other members of the conspiracy will be liable for the balance of their claim. But the bill would provide a strong disincentive to plaintiffs to accept a settlement for less than the settling defendant's market share because to do so would deny them full recovery. The result will be to force all parties to remain in protracted and expensive litigation.

Second, the bill forces plaintiffs to join as defendants all members of the industry who *may* have participated in the conspiracy even if the plaintiff has little evidence indicating their participation or even if the potential defendants appear incapable of satisfying a significant judgment. The bill purports to create an exception for claims reduction if a person is not "legally or practically available" as a defendant. The meaning of this phrase, however, is extremely unclear. The only examples cited by the majority report are cases where persons are beyond the jurisdiction of the court or are defunct co-conspirators without successors. Apparently a person who is financially insolvent is, nevertheless, "practically available." The law allows the plaintiff to sue in such a case and to present his claim in any eventual bankruptcy proceding, but the possibility that the defendant can satisfy a judgment is very low or absent altogether. What if the plaintiff only has a bare suspicion that a potential defendant participated in the conspiracy? Is the person "legally or practically available" as a party? The Federal Rules of Civil Procedure penalize parties for making a claim without a good faith belief that it is "well grounded in fact." Yet the bill creates a conflict by reducing the plaintiff's claim if it turns out that the person should have been sued.

In the case where a plaintiff fails to pursue one or more parties on the grounds of lack of evidence or apparent insolvency, the defendant is likely to argue that the parties should have been sued and that the claim should be reduced. The result is to introduce a difficult and complex issue into the litigation—was the defendant "practically available"? The problem is exacerbated by the failure of the bill to describe what is meant by the phrase. In addition to this added complexity, the effect of this provision may be unfair to plaintiffs. If the plaintiff has made a reasonable decision that a particular person is not part of the conspiracy and does not join him, the defendant may nevertheless later prove that the person

was part of the conspiracy. In that case, the plaintiff may be subject to a significant reduction in his claim.

A final issue regarding the promotion of litigation concerns the complex standards set forth in the bill to allocate responsibility among defendants. Under current law, the court need not deal with the difficult task of apportioning responsibility among defendants since each is jointly and severally liable. However, the bill provides two rules for allocating responsibility. In the case of price-fixing conspiracies, damages are to be allocated "on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments."

This provision raises a number of questions. First, in the case in which a member of the conspiracy has had no sales, how are damages allocated to it? This situation occurs, for example, when a participant in a bid-rigging conspiracy is paid off not to submit bids. Second, how are damages apportioned in the case where a plaintiff suffers from higher prices for purchases from persons not in the conspiracy but where the plaintiff can recover on the theory that the "umbrella" of the conspiracy allowed others to raise prices, too?

In a case other than price-fixing among competitors, the bill contains an even more complex and vague standard for allocating damages. In these cases the bill provides that damages shall be allocated on the basis of "relative responsibility for the origination or perpetration of the violation for which damages are being awarded and the benefits dervived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages by the method used (in the standard for price-fixing cases)."

The effect of this provision is to introduce extremely difficult factual issues into the litigation. For example, in a vertical price-fixing case, the court will have to decide whether the manufacturer or the retailer was more responsible for the price-fixing scheme. Also, it is not clear who has the burden of establishing the proper allocation. If the burden is on the plaintiff, it will be a major added evidentiary hurdle in obtaining compensation. Vertical price-fixing cases present substantial proof problems now because the defendants invariably dispute whether there has been an actual agreement to fix prices. Proving which of the defendants was more responsible could be an even more difficult task.

If the plaintiff settles with the retailer or fails to join him, the manufacturer-defendant will undoubtedly argue that he was not the party primarily responsible for the agreement and that it is the plaintiff's burden to establish otherwise. If the plaintiff cannot establish that the manufacturer was primarily responsible, the plaintiff is subject to a loss of most of his claim. Similar problems occur in the case of boycotts, market allocation schemes, exclusive territorial arrangements, and all other antitrust violations which trigger the application of this standard. The overall result may be that the issue of calculating liability of each defendant is as complex as litigating liability itself.

UNDERCUTTING STATE ANTITRUST ENFORCEMENT

An additional problem of promoting litigation arises under the bill which particularly affects state law enforcement officials. In the hearings regarding S. 1300, the representative of the Attorney General of the State of New York testified that state officials may release a defendant from liability for damages in return for his cooperation in testifying against other members of a price-fixing conspiracy. Through this parctice, law enforcement officials are able to obtain vital evidence in proving the violation. The bill has the effect of reducing the claim for damages if the state obtains testimony in this way. Consequently, state law enforcement officials would be put in the dilemma of choosing whether to obtain essential evidence or to reduce the claim of their state or consumers of their state in a *parens patriae* suit.

CONCLUSION

This bill is intended to give relief to persons who have engaged in serious *criminal* violations of the antitrust laws. It will inevitable reduce deterrence and hamper the ability of the victim of antitrust violations to recover the damages provided by law. By undercutting the concept of joint and several liability for antitrust violations, it sets an extremely troubling precedent for the continued vitality of joint and several liability in other areas of the law. It also strikes a blow against effective state law enforcement by depriving the states of an important law enforcement tool.

The past five and one half years have witnessed a significant decline in enforcement of the antitrust laws by this administration. The administration has made one proposal after another to ease the bar on anticompetitive mergers, to allow resale price maintenance, to restict the use of treble damages, the list goes on and on. This is not the time to make private enforcement of the antitrust laws more difficult.

The opponents of this bill include those who are harmed by antitrust violations, American consumers. A letter dated April 23, 1986, signed by representatives of Consumers Union, the Consumer Federation of America, the United States Public Interest Research Group, and Public Citizen stated:

> . . . the addition of claims reduction to antitrust litigation, while purporting to leave the current system of joint and several liability intact, would in fact signal the first step in the abolition of joint and several liability. It would also decrease the deterrent effect of the antitrust laws and, more than likely, increase the amount and complexity of antitrust litigation.

In addition, the National Association of State Attorneys General opposes this bill. In a letter dated April 29, 1986, the Association stated:

> . . . we believe that this bill, if enacted would be poor antitrust policy, would further unduly burden the parties and courts in antitrust litigation, and would adversely affect future litigation brought by the states on their own

behalf or representing consumers who have been injured by price-fixing conspiracies.

I do not discount entirely the concern of proponents of this bill that there may be unfairness in particular cases imposing damages on individual defendants far in excess of their market share. However, the evidence presented to the Committee falls far short of establishing that this theoretical concern actually occurs with any frequency. If there is a need for a legislative change in this area, a far preferable approach is to allow a small defendant to seek contributions against other defendants in certain cases. In 1979, Senator Kennedy and I wrote:

> When effective private enforcement of the antitrust laws will not be compromised, the federal courts should have authority to permit a defendant to seek contribution from a joint wrongdoer who is equally or more responsible for plaintiffs injury. (See "Antitrust Equal Enforcement Act of 1979," Report of the Committee on the Judiciary on S. 1468, 96th Cong., 1st Sess., p. 35.)

This approach places the burden of redistributing damages which have been unfairly allocated where it belongs, on the parties who have engaged in antitrust violations. The courts could, for example, be authorized to allow a suit for contribution in a separate proceeding if a small defendant has been forced to pay damages so far in excess of its market share that there is manifest injustice. Instead of adopting this approach, however, the Committee has adopted a measure which places the burden entirely on the innocent plaintiff.

The Congress should reject this attempt to undermine the effectiveness of current antitrust penalties for criminal price-fixing.

HOWARD M. METZENBAUM.
EDWARD M. KENNEDY.

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